

GUIDELINES

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The Newsletter of the New Jersey Executive Commission on Ethical Standards

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THE EXECUTIVE COMMISSION ON ETHICAL STANDARDS

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ecutive Director Rita L. Strmensky.

The newsletter this quarter is devoted to a discussion of the Executive Commission's decisions, policies and guidelines concerning the post-employment provisions of the Conflicts Law. In addition, in light of the upcoming holiday season, the Commission's "Guidelines Governing Receipt of Gifts and Favors by State Officers and Employees" is also included.

POST EMPLOYMENT RESTRICTIONS

Presented below are general explanations of the statutory provisions as well as summaries of past Commission cases. The case presentations are designated only to provide examples of post-employment issues that have been addressed by the Executive Commission. Specific questions regarding a particular

The cases presented in "Guidelines" are designed to provide State employees with examples of conflicts issues that have been addressed by the Executive Commission. Specific questions regarding a particular situation should be addressed directly to the Commission.

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The sections of the Conflicts Law covering post-employment are *N.J.S.A. 52:13D-17*, the general prohibition, and 17.2(c), the casino post-employment restriction.

N.J.S.A. 52:13D-17 provides:

No State officer or employee or special State officer or employee, subsequent to the termination of his office or employment in any State agency, shall represent, appear for, negotiate on behalf of, or provide information not generally available to members of the public or services to, or agree to represent, appear for, negotiate on behalf of, or provide information not generally available to members of the public or services to, whether by himself or through any

partnership, firm or corporation in which he has an interest or through any partner, officer or employee thereof, any person or party other than the State in connection with any cause, proceeding, application or other matter with respect to which such State officer or employee or special State officer or employee shall have made any investigation, rendered any ruling, given an opinion, or been otherwise substantially and directly involved at any time during the course of his office or employment. Any person who willfully violates the provisions of this section is a disorderly person, and shall be subject to a fine not to exceed \$500.00 or imprisonment not to exceed six months, or both.

N.J.S.A. 52:13D-13(g) defines “interest” as:

“Interest” means (1) the ownership or control of more than 10% of the profits or assets of a firm, association, or partnership, or more than 10% of the stock in a corporation for profit other than a professional service corporation organized under the “Professional Service Corporation Act.” P.L. 1969, c. 232 (C. 14A:17-1 et seq.); or (2) the ownership or control of more than 1% of the profits of a firm, association, or partnership, or more than 1% of the stock in any corporation, which is the holder of, or an applicant for, a casino license or in any holding intermediary company with respect thereto, as defined by the “Casino Control Act,” P.L. 1977, c.110 (C. 5:12-1 et seq.). The provisions of this act governing the conduct of individuals are applicable to shareholders, associates or professional employees of a professional service corporation regardless of the extent or amount of their shareholder interest in such a corporation.

APPLICATION OF SECTION 17 GENERAL POST-EMPLOYMENT PROHIBITION

Specific Cause, Processing, Application or Other Matter

Section 17 prohibits a former State officer or employee from representing, appearing for, negotiating on behalf of, providing information or services not generally available to the public or agreeing to perform any of those activities for any party, other than the State, in connection with those causes, proceedings, applications or other matters in which the officer or employee had made any investigation, rendered any ruling, given any opinion or been otherwise substantially and directly involved while in State employment. There is no time limit on this prohibition.

It is important to note that these restrictions apply to specific causes, proceedings, applications or other matters in which a former State officer or employee was “substantially and directly involved” while in State employment. This restriction does not extend to “determinations of general applicability or the preparation or review of legislation which is no longer pending before the Legislature or the Governor.” Whether a cause, proceeding, application or other matter at issue in a post-employment is categorized as specific or general is a determination made by the Executive Commission on a case-by-case basis. Questions about the nature of matters with which employees had involvement during the course of their official duties should be directed to the Executive Commission.

In certain situations it may be difficult to determine whether a former

State officer or employee was “substantially and directly involved” in a certain matter or whether such officer or employee had merely been technically or formally involved. Such determinations are made as individual cases arise.

Provide Information Not Generally Available to the Public

Section 17 prohibits former State officers and employees from providing information not generally available to the public. The Commission normally solicits input from the former employee’s agency in determining whether the information in question is generally made available to the public.

Application of Restriction to Partnership, Firm or Corporation

The restrictions contained in the Conflicts of Interest Law apply to the partnership, firm or corporation under the following circumstances: (1) if the former State employee is a shareholder, associate or professional employee of a firm organized as a professional service corporation or (2) if the former State employee owns or controls more than 10% of the stock of a corporation or more than 10% of the profits or assets of a firm, association or partnership.

The post-employment restrictions extend, therefore, to former State officers and employees personally and to any professional service corporation with which he/she is employed or associated or is a shareholder. In addition, the restriction also extends to those employees or officers or partnerships, firms or corporations in which the former State officer or employee has more than 10% ownership or control. If a former

State officer or employees is employed by a company in which he/she does not have more than a 10% interest, and the company is not a professional service corporation, the restrictions contained in the Conflicts law pertain to him/her personally but do not extend to the corporation by which/he/she is employed.

SAMPLE GENERAL POST-EMPLOYMENT CASES ADDRESSED BY THE COMMISSION

Employment With a Firm With Which State Officer or Employee Has Contact in His/Her Official Capacity

The Commission has addressed the issue of employment with a firm with which a State officer or employee has contact in his/her official capacity on numerous occasions. Listed below are some examples.

1. The State employee, a Highway Supervisor, Division of Design at the Department of Transportation (“DOT”) requested permission to accept a position with which he came in contact in his official capacity. The Division of Design was responsible for all phases of projects involving bridges, drafted the actual contract agreement, supervised its administration, and acted as liaison between the consultant and the Department. The actual choice of the consulting firm was the responsibility of the Contract Selection Committee which was separate and apart from the Division of Design. The employee was not a member of the Contract Selection Committee.

The Commission determined that it would not be a conflict of interest for the employee to accept a consultant

position with a firm with which he came in contact during his State service. He was, however, permanently restricted from representing, appearing for or negotiating on behalf of the firm on any matter in which he had been substantially and directly involved during his State employment. The Commission requested that as a member of the consulting firm, he refrain from working on any bridge projects that were before the DOT while he was a State employee. The employee was advised that there were no restrictions on his participation on behalf of the consulting firm before the DOT on new matters. Commission Case No. 763-79.

2. The State employee was offered a position as vice-president of Facilities Maintenance for a construction management and development company. As a State employee, the individual had been an engineer in the Bureau of Lease Construction, Department of the Treasury, and had been involved in monitoring construction at 2 of the 14 properties owned by the company and leased to the State.

The Commission discussed whether there was an improper “revolving door” appearance to the employee being offered the position. Upon learning that the development company had solicited the employee for the vice-president position and that the employee had not sought the position, the Commission considered the appearance issue to be resolved. The Commission then determined that section 17 did not bar the employment with the development company but that the employee could not represent the company with respect to the two properties with which he had involvement as a State employee. Commission Case No. 5-90.

3. A Department of Energy employee received an offer of employment from a subcontractor with whom she had interaction in her official capacity. The interaction included accompanying the subcontractor on “walk throughs” of institutions applying for grants from the Department and auditing and monitoring the status of grant applications.

The Commission reviewed the matter under the section 17 post-employment restriction and also considered whether the employee had exercised an unwarranted privilege prohibited by section 23(e)93) of the statute. The Commission determined that although the employee had some involvement and contact with the subcontractor in her official capacity, there did not appear to have been any substantial and direct involvement in a specific matter by the employee during the course of her employment. As to the unwarranted privilege provision, the Commission determined that since the employee did not solicit the position with the subcontractor but rather was approached by the subcontractor and immediately contacted her supervisor regarding the offer of employment, no unwarranted privilege existed. Commission Case No. 875-80.

Matters Pending Before State Employee's Former Agency

Former State officers and employees are not prohibited from working on matters that originated in their former State departments or agencies subsequent to their leaving State service so long as they had no substantial and direct involvement in those matters.

In 1974, the former Acting Director of the Division of Water Resources in the Department of Environmental Protection requested an opinion from the Commission as to the whether he could accept employment with a consulting firm which had several matters before the Division of Water Resources. These matters included a stream encroachment permit, two water pollution control permits, a loan offer and grant offer.

The Commission determined that since the Acting Director's signature appeared as approving the two water pollution control permits, the loan offer and the grant offer, he was precluded from becoming involved in those matters during his employment with the firm. Because he was not involved with the stream encroachment permit, the Commission found that it did not fall within the section 17 prohibition. *Advisory Opinion No. 23.*

Employment by Entities Receiving Funding from Former Agency

In 1972, the former Chief of the Bureau of Financial Aid at the Department of Community Affairs ("DCA") requested permission to accept employment in and for a municipality whose program he was responsible for coordinating during his tenure at the Department. The employee made the contract arrangements with the city for funding from DCA; however, he did not sign off on the pending contracts.

The Commission determined that the former employee made the contract arrangement for funding by the DCA and that such activity on the part of the employee constituted direct involvement

within the meaning of section 17. All monies for administering the municipality's program came from the DCA. *Advisory Opinion No. 2.*

In 1980, the Commission issued two advisory opinions dealing with employment by entities receiving funding from a former agency and distinguished the cases based on the "substantial and direct" involvement criteria articulated in the statute.

In the first instance, the Commission addressed a situation which involved an individual who worked for the State Law Enforcement Planning Agency ("SLEPA") as a Senior Planner. During the course of his employment, he had official associations with a County Director of a Planning Board who was anxious to participate in a SLEPA Planning Program. The Senior Planner advised the Director to send a letter to SLEPA stating the county's interest in the program, which the Director did. Several months subsequent to receiving information from SLEPA, the Director submitted an application seeking SLEPA funding for his County Planning Program. The Senior Planner then assisted the Director in completing the application by providing data relative to the program and, in particular, to the county's personnel and financial needs. The Senior Planner then became interested in the position which was to be supported by the SLEPA grant.

The Commission determined that since the individual was substantially and directly involved in the awarding of the SLEPA grant, he was precluded from such employment due to the post-employment restriction. *Advisory Opinion No. 37.*

The Executive Commission considered two related requests for advice involving former SLEPA employees who had accepted or desired to accept employment with county agencies receiving SLEPA grants. The individuals, in their capacities as State employees, had no involvement in processing or otherwise acting upon the grant applications of the county agencies that later became their employers.

The Commission determined that the employment was not proscribed as the former State employees were not substantially and directly involved in these matters during the course of their State employment. The Commission determined that, in and of itself, a grantor-grantee relationship between an individual's former State agency and his subsequent non-State employer normally does not give rise to a prohibited post-employment situation within the framework of section 17. The Commission noted that, of course, the applicability of the post-employment restriction of the Conflicts of Interest Law to any given sets of facts and circumstances ultimately can be determined only by direct inquiry to the Executive Commission on Ethical Standards. *Advisory Opinion No. 39.*

Seeking Future Employment

In the past, the Executive Commission has determined that employees who have direct and substantial contact with any consultants or vendors doing business with the State must refrain from circulating resumes or in any manner seeking employment with those firms while still in State service. If an employee is solicited for potential employment by a firm with which he/she

has direct and substantial contact, that solicitation must be disclosed immediately to the employee's management and to the departmental ethics liaison officer to avoid a situation where an employee may appear to be using his/her official position to gain an unwarranted advantage. Employees who do not have direct and substantial contact with consultants or vendors doing business with the State may circulate resumes and enter into discussions regarding potential employment with those firms as long as they also avoid a situation that may give rise to an unwarranted advantage. All employees are cautioned that discussions, interviews, and negotiations should not take place on State time. Commission Case No. 83-88.

In summary, the general post-employment restrictions do not prohibit a former State officer or employee or any firm in which he/she has an interest from representing a party other than the State concerning:

- Determinations or general applicability.
- Preparation or review of legislation which is no longer pending before the Legislature or the Governor.
- Regulations no longer pending before an agency since these are not specific causes and are analogous to legislation.
- Before any State agency, including the individuals former agency, if the former employee was not "substantially and directly" involved in the matter while employed by the State.

- Accepting employment with entities receiving funding from the individual's former agency or any other State agency if the State officer or employee was not "substantially and directly" involved in the matter in question.

- Providing information generally available to the public.

- Accepting employment with a firm with which the State officer or employee had contact in his/her official capacity.

Section 17.2(c) – Casino Post-Employment Restriction

N.J.S.A. 52:13D-17.2(c) provides:

No person or any member of his immediate family, nor any partnership, firm or corporation with which such person is associated or in which he has an interest, nor any partner officer, director or employee while he is associated with such partnership firm or corporation, shall, within two years next subsequent to the termination of the office or employment of such person, hold, directly or indirectly, an interest in, or hold employment with, or represent, appear for or negotiate on behalf of, any holder of, or applicant for, a casino license in connection with any cause, application or matter, or any holding or intermediary company with respect to such holder of, or applicant for, a casino license in connection with any phase of casino development, permitting, licensure or any other matter whatsoever related to casino activity. Nothing herein contained shall alter or amend the post-employment restrictions applicable to members and employees of the Casino Control

Commission and employees and agents of the Division of Gaming Enforcement pursuant to subsection b.(2) of section 59 and to section 60 of P.L. 1977, c.100 (C. 5:12-59b.(2) and C. 5:12-60).

Section 17.2(c), the "Casino Ethics Amendment," prohibits a "person" or any member of his/her immediate family from holding, directly or indirectly, an interest in, or holding employment with, or representing, appearing for, or negotiating on behalf of, any holder of, or applicant for, a casino license in connection with any case, application or matter, or any holding or intermediary company with respect to such holder of, application for, a casino license in connection with any phase of casino development, permitting, licensure or any other matter whatsoever related to casino activity. This prohibition extends for a period of two years.

Section 17.2(a) defines "person" as:

... any State officer or employee subject to financial disclosure by law or executive order and any other State officer or employee with responsibility for matters affecting casino activity; any special State officer or employee with responsibility for matters affecting casino activity; the Governor; any member of the Legislature or full-time member of the Judiciary; any full-time professional employee of the Office of the Governor, or the Legislature; members of the Casino Reinvestment Development Authority; the head of a principal department; the assistant and deputy heads of a principal department, including all assistant and deputy commissioners; the head of any division of a principal department; any member of the governing body, or the municipal judge or the municipal attorney

of a municipality wherein a casino is located; any member of or attorney for the planning board or zoning board of adjustment of a municipality wherein a casino is located, or any professional planner or consultant regularly employed or retained by such planning board or zoning board of adjustment.

Section 13(I) defines “member of the immediate family” as:

... the person’s spouse, child, parent or sibling residing in the same household.

Application of Restriction to Partnership, Firm or Corporation

The restrictions contained in section 17.2(c) apply to “persons” and immediate family members and to any partnership, firm or corporation with which such “person” or family member is associated or in which he/she has an interest. The Conflicts Law defines “interest” as the ownership or control of more than 10% of the profits or assets of a firm.

SAMPLE CASINO POST-EMPLOYMENT CASES ADDRESSED BY THE COMMISSION

In 1982, the Executive Commission interpreted the “associated” language of section 17.2(c) to mean that, regardless of the business structure of the firm, any partnership, ownership or employment by a “person” or immediate family member with a firm that represents, in any capacity in any matter, a casino license holder brings that firm under the two-year restriction of the statute. Although the nature of the “associated” relationship is not defined by

the statute, the Commission adopted the position that it includes partnership, ownership and employment relationships because of the internal sense of the provision which “refers to partners, officers, directors, and employees as those deemed associated with partnerships, firms or corporations within the meaning of its terms.” Commission Case No. C15-80.

In 1986, the Commission, building on its 1982 interpretation, determined that “persons” and law firms with which they are associated were prohibited from representing casino licensees or applicants in any circumstances whatsoever. With regard to representing a holding or intermediary company with respect to a licensee or applicant, the representational prohibition is not so broad, applying only to any matters related to casino activity. Commission Case No. C2-86.

In 1989, the Executive Commission rendered a formal advisory opinion concerning whether an “of counsel” relationship associates a former State employee with a law firm for the purposes of the application of section 17.2(c). The Commission determined that the facts and circumstances of the proposed “of counsel” relationship would constitute an “association” and would subject the law firm to the provisions of section 17.2(c). *Advisory Opinion No. 40*.

In 1991, the Executive Commission restated its interpretation of section 17.2(c) in connection with an analysis of the post-employment section of the Casino Control Act, N.J.S.A. 5:12-1 et seq. The Commission noted that:

Section 17.2(c) restricts not only the representation by a firm in which a

["person"] has an interest but also prohibits representation by a firm with which the ... "person" ... is "associated." Commission Case No. 18-91.

In 1992, a former Casino Control Commission employee requested an opinion from the Commission regarding the application of the casino post-employment restriction to her situation. The former employee established a private practice and was interested in providing legal services to law firms on an independent contractor basis. Because the possibility existed that she would offer her services to an Atlantic City law firm representing casino licensees, she inquired as to the effect of section 17.2(c) on the arrangements that she would make.

The Executive Commission determined that section 17.2(c) of the Conflicts law did not preclude the former State employee from establishing the proposed independent contractor relationship with a law firm that represents holders of casino licenses. This ruling was limited to the circumstances of this case. The crucial question in this case was whether the services that the former employee proposed to provide for a law firm created an "association" with that law firm; such an association would subject a law firm as well as the former employee to the section 17.2(c) restriction. Commission Case No. 5-92.

Members of the Bar

Former State officers and employees who are also members of the bar must also adhere to the ethical standards adopted by the New Jersey Supreme Court.

Except as law shall otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter (1) in which the lawyer participated personally and substantially as a public officer or employee, (2) about which the lawyer acquired knowledge of confidential information as a public officer or employee, or (3) for which the lawyer had substantial responsibility as a public officer or employee. (RPC 1.11(a)).

The scope of New Jersey's Conflicts of Interest Law is at least as broad as the rules covering attorney ethics. Requests for advice on the application of the Rules of Professional Conduct should be directed to the Supreme Court Advisory Committee on Professional Ethics.

GUIDELINES GOVERNING RECEIPT OF GIFTS AND FAVORS BY STATE OFFICERS AND EMPLOYEES

Promulgated by the Executive Commission on Ethical Standards.

1. Each department shall require full disclosure by employees to the office of the department head through the Ethics Liaison Officer upon receipt of a gift or any other thing of value, from a person, corporation, or association with whom they have had contact in their official capacity.

2. Each department should designate an Ethics Liaison Officer to monitor compliance with specific procedures under which officers and employees shall proceed upon receipt of a gift or any other thing of value, from a person, corporation

or association with whom they have had any contact in their official capacity.

3. All officers and employees should be instructed that any gift or other thing of value received from a person or corporation with whom they have had contact in their official capacity must be reported and remitted immediately to the Ethics Liaison Officer. Similarly, any favor, service, employment or offer of employment from such person or corporation must be reported immediately.

4. Unsolicited gifts or benefits of trivial or nominal value, such as complimentary articles offered to the public in general, and gifts received as a result of mass advertising mailings to the general business public may be retained by the recipient or the recipient's department for general use if such use does not create an impression of a conflict of interest or a violation of the public trust. An impression of a conflict may be created, for example, if an employee of a regulatory agency uses a pocket calendar conspicuously marked with the name of a company that it regulates or if an office in a State agency displays a wall calendar from a vendor, creating the impression of an endorsement. If circumstances exist which create a reasonable doubt as to the intention with which the gift or benefit was offered, the other paragraphs of these Guidelines govern.

5. The Ethics Liaison Officer shall determine whether the gift, favor, employment, offer of employment, or anything of value was given or offered with the intent to influence or reward the performance of the recipient's public duties and responsibilities, or whether it may be reasonably inferred to have been given or offered with the intent to

influence the performance of his or her public duties and responsibilities, or whether the use of the item will create an impression of a conflict of interest or a violation of the public trust.

6. Upon a determination that there was an intent or it could be reasonably inferred that there was an intent to influence the performance of the recipient's public duties and responsibilities, or that the use of the item will create the impression of a conflict or a violation of the public trust, the Ethics Liaison Officer shall return the gift or thing of value to the donor.

7. The Ethics Liaison Officer will have the responsibility of keeping the records of all such occurrences; names of the employees, individuals, and companies involved, and the final disposition of the gift or thing of value.

8. The assistance of the Director of the Executive Commission will be available to all Ethics Liaison Officers to aid them in the evaluation of individual cases.

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Regarding "Guidelines"

Please direct any comments or questions about "Guidelines" to Jeanne A. Mayer, Esq., Deputy Director, Executive Commission on Ethical Standards, P.O. Box 082, Trenton, NJ 08625, (609)292-1892.

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